Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JOHN MANSOUR

Petitioner,

vs.

RONALD GOLDSTOCK and MARTIN MARCUS,

Respondents.

Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A staff investigator proposed that petitioner, a prosecutor, cancel an arraignment to facilitate the abusive use of an arrest warrant. Petitioner rejected the proposal and told the investigator and his own supervisor that the proposal was for an abusive use of the warrant. The proposal was not implemented.

Question: Was petitioner's disapproval of the proposal for abuse of the warrant constitutionally protected speech?

A. Is a co-worker's proposal for wrongdoing a "potential wrongdoing" within this Court's application of a "matter of public concern" under the First Amendment?

PARTIES

The parties to this action are now:

Petitioner: JOHN MANSOUR

Respondents: RONALD GOLDSTOCK AND MARTIN MARCUS

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CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I: Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14, Section 1: Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, §1983: Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this sec-

tion, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

OPINION BELOW

The single opinion pertinent to this petition is that of the state court upon its dismissal of the action by summary judgment

This opinion was reported in part at ***Mansour v. Abrams*, 151 Misc. 2d 121, 573 NYS 2d 364**.

The complete opinion is at Appendix B.

STATEMENT OF JURISDICTION

The final order which denied petitioner's motion for leave to appeal to the New York State Court of Appeals was entered in that Court on June 13, 1995. It is Appendix A. That order exhausted petitioner's remedies in the state courts.

The jurisdiction of this Court is invoked under 28 USCS §1257 and Rule 10(.1)(c) of the Rules of the Supreme Court, as pertain to when a state court decides a federal question in a way that conflicts with the applicable decisions of this Court.

STATEMENT OF THE CASE

FACTS

Petitioner was a prosecutor. He had scheduled an arraignment by surrender of the accused in Court with his lawyer for the next day. A staff investigator proposed to petitioner that he cancel the arraignment so that instead the accused could be ar-

rested by execution of the indictment warrant several days later, on a Friday night, so as to jail the accused over a weekend. His only reason was that the weekend jailing's "shock value" might serve to coerce the accused into helping the investigator in his work.

Petitioner answered to the investigator that to cancel the arraignment to facilitate a later arrest and weekend jailing as a pressure tactic, was an improper use of an arrest warrant. The investigator complained to headquarters. Petitioner's supervisor called, and petitioner repeated his disapproval of the proposal and his reason for it to his supervisor. His supervisor was angry at petitioner's disapproval but relented to petitioner's view. The investigator's proposal was not implemented. A few months later petitioner was fired.

Petitioner reasonably considered this proposed use of the arrest warrant as abusively ulterior to its legitimate function. The same kind of tactic for gratuitous jailing had been condemned long before in New York as an abuse of the warrant process. ***Rothbard v. Ringler*, [N.Y. Sup. Ct. 1947], 77 NYS 2d 351.**

[Record reference is R 2531-2533 (¶12, Mansour affidavit), R 558-559, 2245-2252]

History of the Federal Question

Petitioner sued in state court under 28 USC §1983 for discharge from employment in violation of his free speech rights under the First Amendment of the United States Constitution.

The trial court dismissed this claim on a motion for summary judgment. The part of its opinion relevant to this appli-

cation was reported at 151 Misc. 2d 121, 573 NYS 2d 364. The full opinion is at Appendix B. Its order of dismissal is at Appendix C.

The Appellate Division, Fourth Department, affirmed the dismissal on the opinion of the trial court by order of July 14, 1992 (case #79 at 185 AD2d 671, 587 NYS 2d 880). Appendix D.

The Court of Appeals, by order entered October 27, 1992, dismissed appeal from the order of affirmance on the ground that the appeal was from a non-final order. (80 NY 2d 972). Appendix E.

Petitioner went to trial on other claims in the complaint. Final judgment against petitioner on those claims was entered November 28, 1994. Appendix F.

By order entered February 21, 1995 the Court of Appeals dismissed petitioner's appeal as of right from the prior non-final order of the Appellate Division of July 14, 1992, on the ground the appeal did not raise a substantial constitutional question. Appendix G.

By order filed June 13, 1995, the New York State Court of Appeals denied petitioner's motion for leave to appeal to the Court of Appeals from the prior non-final order of the Appellate Division of July 14, 1992. Appendix A.

This exhausted petitioner's remedies for review in the state courts.

REASONS TO GRANT THE WRIT

This case involves the First Amendment right of a staff prosecutor to disagree within the office with a co-worker's proposal which, if implemented, would improperly prejudice a fundamental right of an accused.

Here, petitioner voiced disapproval to a co-worker and his own supervisor about a proposal for action by the office which petitioner saw as abusively improper. His supervisor was displeased with petitioner's disapproval but acceded to it. The proposed abuse did not happen. Petitioner was later fired.

The state court concluded that because the proposed abuse did not come to fruition, i.e., that no "illegal or unethical conduct" resulted from it, petitioner's disagreement with it was speech about an "internal office affair" and thus not protected by the First Amendment.

> "Most of (the matters) appear to involve disagreements over the internal affairs of the Task Force. *Disagreement(s) over ... whether the Task Force should have arrested an individual or allowed him to surrender .... do(es) not evidence any illegal or unethical conduct by the Task Force,* nor does Plaintiff allege that they do. *Clearly, therefore, they are not matters of public concern.* Every criticism by a public employee directed at his superiors does not 'plant the seed of a constitutional case .... [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal affairs' (Connick v. Myers, 461 U.S. 138, 149, *supra*)." (emphasis supplied) *Appendix B, pp. 7-8 [R-35-36].*

This Court has noted that "matter of public concern" extends to speech about *potential* wrongdoing in the course of the employer's operations. ***Connick v. Myers,* 461 U.S. 138, 148, 103 S. Ct. 1684, 1691, 75 L. Ed. 2d 708, 721 (1983).**

Petitioner contends the state court misapplied this Court's "internal office affairs" exception to constitutional protection, to petitioner's speech about "potential wrongdoing" which deserves constitutional protection. ***Connick v. Myers, supra,* 461 U.S. at p. 149, 103 S. Ct. at p. 1684, 75 L. Ed. 2d at p. 721.**

The correct application of "potential wrongdoing" under the First Amendment should include a co-worker's proposal which, if implemented, would wrongly affect a substantial right of an accused. The abusive proposal *itself* creates sufficient "potential for wrongdoing" that disagreement with it deserves constitutional protection. Applied here, the proposal to cancel the arraignment to facilitate a later arrest and jailing, *per se* raised a concern about the accused's Fourth Amendment privilege from unreasonable government interference with his personal liberty by misuse of a warrant.

Constitutional protection should depend upon the content of the proposal and the response to it. It should not depend on a future event unpredictable at the time one speaks. Whether the proposal ever comes to fruition should be constitutionally irrelevant.

The effect of the state court decision to the contrary will be to inhibit the spontaneous discourse among staff needed for the sorting out of ethical issues — and effective self-regulation — within the secretive prosecutors' offices.

It presents First Amendment dilemmas. Each staff prosecutor is personally accountable as an officer of the court for the ethic of his own conduct. Each has an official duty to the public, by oath of office, to avoid impairment of the administration of justice by prejudice to an important right of the accused. Yet, the state court's decision will predictably give pause to many otherwise inclined to speak about ethically questionable aspects of a pragmatically attractive proposal:

> (1) One who discovers an impropriety in a proposal, and succeeds in its prevention, is subject to discharge — but one who silently acquiesces in the improper proposal and speaks out only after the misdeed is done, is rewarded with constitutional protection.
>
> (2) One who disagrees *too persuasively* with a proposal for misconduct, risks retaliation — but one who tenders but unpersuasive lip service to the duty to disagree minimizes the risk of being fired.

The state court decision equates "conscientiousness to duty" to "troublemaker" when someone discovers and airs an ethical taint to an ambitious proposal. It unsettles the law about the "basic, unquestioned constitutional rights" of prosecutors who voice disagreement with internally aired proposals for misconduct. It is a dubious expansion of the qualified immunity defense to the employer. ***Harlow v. Fitzgerald*, 457 U.S. 800, 818-819, 102 S.Ct. 2727, 2738, 73 L. Ed. 2d 396, 410-411 (1982).**

We urge the Court to take this opportunity to clarify that the "basic unquestioned constitutional right" of a government employee to disagree with a co-worker's proposal for wrongdoing does not depend upon whether wrongful conduct later occurs.

THE QUESTION PRESENTED AFFECTS THE SUBSTANTIAL RIGHTS OF THE PETITIONER

The state court dismissal of this claim forced petitioner to go to trial with but part of his case. The jury could not consider whether the dismissed claim either by itself, or along with the First Amendment violations it did find — overcame the respondent's affirmative defense of justification (acceptance of which was the basis of its verdict) and warranted a verdict for petitioner. The prejudice to petitioner is highlighted by the fact that at trial respondents evidenced petitioner's disagreement with the investigator's proposal as justification for their decision to fire him.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: August 21, 1995